

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>In the Matter of:</b>	)
	)
<b>REQUEST TO REDUCE PRE-HARVEST</b>	) <b>Docket No. EPA-HQ-OPP-2007-0181</b>
<b>INTERVAL FOR EBDC FUNGICIDES</b>	)
<b>ON POTATOES</b>	)

**ORDER GRANTING EXTENSION OF TIME TO FILE PRE-HEARING EXCHANGES  
AND DEFERRING PRE-HEARING CONFERENCE**

**Background and Arguments of the Parties**

A Notice of Hearing on Request to Reduce Pre-Harvest Interval (PHI) for EBDC Fungicides on Potatoes was published in the Federal Register on July 11, 2007, by the Acting Director of the Special Review and Reregistration Division of the Office of Pesticide Programs, United States Environmental Protection Agency ("EPA"), under the authority of 40 C.F.R. Part 164 Subpart D. 72 Fed. Reg. 37771. The Natural Resources Defense Counsel ("NRDC") filed a request for hearing on August 10, 2007. The EBDC/ETU Task Force ("Task Force"), which represents certain registrants of EBDCs, is "automatically" a party to this proceeding according to the Notice of Hearing, and filed its Notice of Appearance on August 24, 2007. The EPA is also "automatically" a party to this proceeding. The National Potato Council ("NPC") was granted leave to intervene on September 18, 2007. Thereafter, by Prehearing Order dated September 19, 2007, the parties were directed, *inter alia*, to file prehearing exchanges. The due date set therein for the initial prehearing exchange of EPA, the Task Force and NPC was October 26, 2007.

On October 15, 2007, EPA, the Task Force and NPC ("Movants") jointly filed a Motion for Extension of Time to File Pre-Hearing Documents and Request for Pre-Hearing Conference ("Motion"), requesting the Presiding Judge to convene an early pre-hearing conference pursuant to 40 C.F.R. § 164.50 and to postpone the initial prehearing exchange. The Motion states that granting the request "will provide the parties with the necessary guidance to effectively and efficiently file pre-hearing exchanges and could result in a more efficient and focused proceeding" Motion at 1. The Movants state that they believe there is disagreement among the parties as to the scope of the hearing, explaining that usually the scope of the hearing would be clear as determined by the appropriate cancellation order, but in this case the parties settled and there was no hearing and thus no detailed cancellation order. The Motion states that a prehearing conference could be used to discuss the scope of the hearing and establish procedures for the hearing. The Movants request that their initial prehearing exchange be postponed until

six weeks after the prehearing conference and issues concerning the scope of the hearing are resolved.

On October 25, 2007, NRDC filed its Response to the Motion, opposing a prehearing conference until the Movants present a concrete dispute between the parties that is ripe for adjudication, a request for relief and legal authority in support of the request. In its Response, NRDC asserts that the Movants have not shown such a dispute at this stage of the proceedings, have not specified issues they intend to present at a prehearing conference, have not described how it relates to the prehearing exchanges and have not provided support for their position, and therefore do not allow NRDC to prepare meaningfully for a prehearing conference. Moreover, NRDC contends that a prehearing conference is not necessary at this time, as the Notice of Hearing sets forth the issues of fact and law to be adjudicated and the prehearing exchange is calculated to elicit evidence that will be relevant to the adjudication of these issues. NRDC states that it does not oppose a six-week extension of time to file prehearing exchanges, as long as it is not linked to timing for a prehearing conference, to prevent unnecessary delay in this proceeding.

On October 26, 2007, the Movants filed a Reply to the Response, reiterating that they believe that “there are likely to be issues in dispute concerning the scope of issues that are appropriate for hearing,” noting that they have unsuccessfully attempted to meet with NRDC to discuss the issues. The Movants state that the first issue that they believe may be in dispute involves a “misstatement by EPA” in the Notice of Hearing, identifying as an issue of law to be adjudicated, that if substantial new evidence has been presented pertaining to the request to reduce the nationwide Pre-Harvest Interval (“PHI”), “could the applicant, through due diligence, have discovered this information prior to issuance of the cancellation order?” Instead, this was an issue for the EPA Administrator to determine before issuing the Notice of Hearing, as indicated by 40 C.F.R. §§ 164.131(a) and 164.132(a). The Movants therefore request that the September 19 Prehearing Order be amended to delete the prehearing exchange request set forth in Paragraph 2(C). Motion at 2-3.

The second issue Movants believe to be in dispute “involves whether risk issues unrelated to the dietary risk of EBDC use are material to the hearing.” Reply at 3. Their position is that “the only factual issues to be addressed in the hearing in order for the Court to determine whether a nationwide . . . [PHI] of 3 days meets the FIFRA section 2(bb) standard are related to the carcinogenic, developmental, and thyroid effects of EBDCs and the dietary exposures that would result from the use of a 3-day PHI.” *Id.* Movants assert that those three risks were the basis for the initiation of the Special Review for EBDCs and resulted in the 14-day PHI in most states, and thus information unrelated to those three risks is not material to whether the 1992 cancellation order should be modified. Movants suggest that EPA’s 1992 Notice of Intent to Cancel (“NOIC”, 57 Fed. Reg. 7484 (March 2, 1992)) be used as best evidence of issues that would have been presented at a cancellation hearing. Movants assert that NRDC would not be prejudiced by any delay as the 14-day PHI stays in effect unless it is changed by a decision issued in this proceeding.

## **Discussion and Conclusions**

The procedures in 40 C.F.R. Part 164 Subpart D, which govern this proceeding, do not include any provision for a prehearing conference. The procedures in Subpart B, however, which provide guidance in this proceeding, do include a provision for a prehearing conference, at 40 C.F.R. § 164.50, which provides, in pertinent part, that the Presiding Judge “shall, prior to commencement of the hearing, and for the purpose of expediting the hearing,” order a prehearing conference to consider, *inter alia*, “simplification of issues including listing of specific uses to be contested; . . . necessity or desirability of amendments to the objections or statements of issues, . . . limitation of the number of expert and other witnesses; [p]rocedure at the hearing . . . and . . . [a]ny other matter that may expedite the hearing or aid in the disposition of the proceeding.” Prehearing conferences normally are scheduled in proceedings before Administrative Law Judges *after* the prehearing exchange, which enables the parties to discuss all of the items to consider that are listed in the rule. *See*, 40 C.F.R. §§ 22.19(b) and 164.50(a). Such prehearing conferences generally also include guidance as to procedures at the hearing. Therefore, a prehearing conference is expected to occur in this proceeding after the prehearing exchange.

As to the request to convene an *early* prehearing conference, such a conference is not the most appropriate method of addressing the scope of issues to be addressed at the hearing, and is not supported by relevant rules of practice. Generally in most administrative proceedings, the scope of issues to be heard is determined by the complaint and answer filed by the parties. *See*, 40 C.F.R. § 22.15(c) (“A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer . . . [or] if issues appropriate for adjudication are raised in the answer.”). The scope of issues are amended by *written* motions to amend the complaint or answer. *See*, 40 C.F.R. §§ 22.14(c), 22.15(e), 22.16(a). The prehearing conference, on the other hand, addresses merely “*simplification of issues*” and “*necessity or desirability of amendments to pleadings*,” objections or statements of issues in a prehearing conference. 40 C.F.R. §§ 22.19(b), 164.50(a). The discussion and consideration of “*simplification of issues*” and “*necessity or desirability of amendments to pleadings*,” objections or statements of issues in prehearing conferences does not generally extend to presentation of arguments on the merits of amending the pleading. Such presentation of arguments would constitute motions and responses, which are required to be in writing except for motions made orally on the record during a hearing. 40 C.F.R. §§ 22.16, 22.19(b), 164.50(a), 164.60. While it is noted that 40 C.F.R. § 164.22 does not specifically state that amendments to objections must be requested in writing, and that Section 164.23 authorizes amendments to statement of issues “by the Administrator,” proceedings under Subpart B stemming from EPA’s intent to deny or cancel registration or change classification of a pesticide are of a different nature than proceedings to modify previous cancellation orders under Subpart D, which stem from an applicant’s petition. Written motions and responses ensure that arguments are complete, well presented and well supported, and that there is a clear record of such arguments. Therefore, guidance from the Part 22 and Part 164 Subpart B rules, considered along with policies underlying requirements for motions to be in writing, suggest that the issues to be addressed in hearings under 40 C.F.R. Part 164 Subpart D should be amended only upon written motions and responses. Any prehearing conference to discuss the scope of issues to be addressed at the hearing would likely be superfluous if the parties file written

motions and responses thereon.

In this proceeding, the scope of issues for hearing were set forth in 40 C.F.R. § 164.132(a), the Notice of Hearing, 72 Fed. Reg. at 37778, and reflected in the NRDC's request to participate in the hearing. The Movants note that in the Notice of Hearing, there was a misstatement of an issue to be adjudicated. This is tantamount to a complainant finding a misstatement in its complaint, and thus would be remedied by a motion to amend the complaint. Rather than amending the Notice of Hearing, however, Movants request in their Reply (at 2-3) that the Prehearing Order be amended to delete item 2(C). Such request itself constitutes a motion to amend the Prehearing Order, and NRDC accordingly has an opportunity to file a response.

As to other issues regarding the scope of hearing, the Prehearing Order lists items which are intended to elicit facts relevant to the issues for hearing set forth in Section 164.132(a), the Notice of Hearing, and NRDC's request to participate. To the extent that a party believes that any such item(s) would elicit facts which are not relevant to the issues for hearing, such party may simply not submit information responsive to that item, and/or may explain its position that the item(s) are not relevant. If the opposing party contends that the item is relevant, it may submit a written motion to compel compliance with the Prehearing Order or other appropriate motion. However, where the parties are aware prior to the prehearing exchange that relevancy of such item(s) is disputed, it is more efficient if the party directed to submit such item(s) files a written motion for amendment of the Prehearing Order.

Accordingly, the Movants' request for an early prehearing conference is denied. However, in consideration that the Movants' initial pre-hearing exchanges were due on October 26, 2007, and in anticipation that further motion(s) and/or responses regarding amending the Prehearing Order may be filed, the parties are provided additional time to prepare the pre-hearing exchange documents.

### **ORDER**

1. An extension of time to file prehearing exchanges is hereby granted as follows:

**December 7, 2007** - EPA's, EBDC Task Force's and NPC's Initial Prehearing Exchange(s) due

**January 26, 2008** - NRDC's Prehearing Exchange, including direct and/or rebuttal evidence due

**February 26, 2008** - EPA's EBDC Task Force's, and NPC's Rebuttal Prehearing Exchange(s) due

2. The Movants' request for an early prehearing conference to discuss the scope of issues for the hearing is hereby **DENIED**.
3. NRDC may file a response to Movants' request to delete item 2(C) from the Prehearing Order.
4. Any further request to amend the Prehearing Order shall be made by written motion.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: October 29, 2007  
Washington, D.C.

In The Matter of Hearing On Request to Reduce Pre-Harvest Interval For EBDC Fungicides On Potatoes, Docket No. EPA-HQ-OPP-2007-0181

CERTIFICATE OF SERVICE

I certify that the foregoing **Order granting Motion for Extension of Time to File Pre-Hearing Documents**, dated October 29, 2007, was sent this day in the following manner to the addresses listed below.

Sybil Anderson  
Headquarters Hearing Clerk

Dated: October 30, 2007

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